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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 141.

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The Southern Pacific Railroad Company, Homer S. King, Trustee, and Central Trust Company of New York,
Appellants,

vs.

The United States,

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR UNITED STATES.

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Appellants,

vs.

The United States,
Appellee,

BRIEF FOR UNITED STATES.

This bill was filed by the United States against the Southern Pacific Railroad Company, and the trustees in certain mortgages, to secure bonds issued by said company, and against numerous other defendants, (1) to determine the title to about thirty thousand acres of land within the limits of the grant to the Southern Pacific Railroad by the act of March 3, 1871, but which were excepted from such grant by reason of a prior grant to and reservation for the Atlantic and Pacific Railroad Company, act July 27, 1866; (2) to determine

what of such lands have been sold by the Southern Pacific Railroad Company to *bona fide* purchasers; (3) to secure a confirmation of the title to such lands as are in the hands of *bona fide* purchasers, and cancellation of patents of such lands as are still owned by the company; (4) to establish a trust in, and an accounting for the moneys received by the Southern Pacific Railroad Company, for such lands as it has sold to *bona fide* purchasers, to the extent of one dollar and twenty-five cents per acre, in accordance with the provisions of the acts of Congress of March 3, 1887, and March 2, 1896. (See appendix hereto for Acts.)

The Southern Pacific Railroad Company, and the other twenty-two defendants to the bill who claim to be bona fide purchasers, filed answers to the merits and took the testimony in the Circuit Court, without objecting to the jurisdiction in equity. [Record 48, 46, 146, 147, 159, 170, 178.]

The Circuit Court, upon final hearing, entered a decree in favor of the United States for such of the lands as had not been sold to *bona fide* purchasers, confirmed the titles of *bona fide* purchasers, and a decree in favor of the government for the value of the lands sold to *bona fide* purchasers not exceeding the government minimum price of $1.25 per acre. [Record 201-251.]

The Circuit Court filed an opinion in support of the decree. [Record 740-765, reported in 117 Fed. 544.]

The Circuit Court of Appeals for the Ninth Circuit unanimously affirmed the decree of the Circuit Court. [Record 787,808, reported in 133 Fed. 651.]

We do not accept the erroneous statements in appellant's brief as to the scope of this bill of complaint, nor as to the objects and relief sought.

The bill of complaint presents a plain, unvarnished statement of the facts [record 2-20], and such facts are more fully and in detail established and found in the agreed statement of facts [record 256, 281], and in the opinions of the courts below, and in the final decree.

In the courts below counsel for appellants wanted to have the bill "stripped of its verbiage," leaving nothing but a portion of the prayer for relief and to have that part denominated "an action in assumpsit."

The bill was not so "stripped" in the Circuit Court, by any special or general demurrer, nor was any attempt made to so strip it, but on the contrary, the defendants and their able attorneys, recognizing that the bill was based upon equitable grounds, and that the relief sought was equitable in its nature, answered fully to the merits, and the case was thus tried and passed to final decree.

Stripping the bill of parts offensive to counsel for defendants does not relieve the case as presented against their clients, as one appealing strongly to the sympathies of a court of equity and to the conscience of the chancellor.

The story can be told in simple language, for, stripped of offensive verbiage, the case is a plain one of a soulless corporation, while constructing a government railroad for national purposes and uses, with the aid of public land grants, appropriating thirty-odd thousand acres of land *patented to it by mistake,* and

selling those lands or most of them to *bona fide* purchasers, retaining the proceeds and refusing to account for the money received or return the land.

The lands described in the bill of complaint are in the same situation, with respect to the Atlantic and Pacific and Southern Pacific grants, as the lands involved in the prior litigations between the United States and the Southern Pacific Railroad Company, and the Government has alleged and proven an estoppel by judgment against the Southern Pacific Railroad Company and those in privity with it, arising out of the former adjudications. [Record 291, 360, 363, 500, 514, 567; see also 146 U. S., 570, 519 and 168 U. S. 1.]

As to what has been determined in the former suits clearly appears from the decision of the court in Southern Pacific Railroad Company v. United States, 168 U. S. 1-66, followed in the present case.

The bill of complaint contains the following allegation:

> "Your orator further alleges that more than one thousand persons, among whom are the defendants above named, sued as representatives of a class, have purchased by immediate or mesne conveyances from defendant Southern Pacific Railroad Company, certain tracts of land described in said Exhibit "A" to this bill, or some interest therein, and who are too numerous to be made parties to this bill, and that all of said persons claim an interest in such lands so purchased under and by virtue of said grants to defendant Southern Pacific Railroad Company, and said acts of March 3, 1887, February 12, 1896, and March 2, 1896, but the nature and extent of such claims are unknown to your orator, except as heretofore set forth, and your orator has joined as defendants those per-

sons above named as representing such numerous purchasers, and which persons fairly represent said purchasers." [Record 15.]

Answers were filed to the bill of complaint by those named in the bill originally as defendants, and by numerous other persons, who have intervened in the cause as defendants, and filed answers, by stipulation, and by order of court.

Each and all of the answers deny the title of the United States, putting in issue the allegations that the patents were erroneously issued to the lands, and allege that the lands described in the bill were granted to the Southern Pacific Railroad Company by acts of Congress; and further allege that the defendants severally were *bona fide* purchasers from the Southern Pacific Railroad Company of the lands described in the pleadings.

The answer of the Southern Pacific Railroad Company sets forth a table of land sales, showing that the lands described in Exhibit "A" to the bill were sold or contracted to be sold by the railroad company in 213 separate contracts of sale to 213 different purchasers [record 74-141]; and the testimony of Jerome Madden shows that the lands were sold, or contracted to be sold, by the railroad company at the times severally, to the persons, and upon the terms set forth in Exhibit "A" to the answer. [Record 696, 697.]

The answer of the railroad company further alleges that these several persons are purchasers in good faith of the several tracts of lands sold, as shown by said table or exhibit.

It appears from the undisputed facts that of the lands described in Exhibit "A" to the bill, and which are also described in Exhibit "A" to the answer, that about one-half of them were conveyed by the railroad company by deeds, prior to this suit, and that about one-half were sold by executory contracts, which still remain unexecuted.

From this review of facts it appears that the Southern Pacific Railroad Company claims to have an interest in the controversy to the lands sold by deed, as a grantor, and as a party in privity with the purchasers, and claims an interest in the remainder of the lands, by reason of the executory contracts outstanding, by reason of the non-payment of the purchase price, or of a considerable part thereof, and it further appears that each and all of the defendants claim some interest in the lands.

The allegation of the bill that the parties interested in these lands as purchasers are too numerous to all be made parties to the suit, and that those named as defendants sufficiently represent the others, appears to be well sustained by the established facts, and the facts were so found by the Circuit Court.]Record 202.]

The answer of the railroad company, their grantor, is full and complete, and an adjudication upon the title in favor of the railroad company will be for the benefit of its grantees, the purchasers; and in addition to being represented by the railroad company *twenty-two of the purchasers have appeared and answered to the whole case,* and who fairly represent the other purchasers as found by both courts below.

But no appeal has been taken by the other purchasers from the decree which confirmed their titles.

It appears from these answers that all of the defendants claim title under the same acts of Congress making grants to the railroad company, and that they all claim the benefits of the adjustment act of March 3, 1887, as supplemented by the acts of February 12, 1896, and March 2, 1896; and it appears from the testimony of Jerome Madden that all of these purchasers purchased under similar conditions and circumstances.

In addition to the 213 purchasers who are made parties or represented in the cause, it appears from the stipulation of the parties filed May 9, 1900, as follows:

> "That, in fact, many of the persons shown by Exhibit "A" to the defendant's answer to have purchased and received deeds of conveyance from the Southern Pacific Railroad Company for lands patented to that company by the United States, thereafter subdivided such lands and sold and conveyed various subdivisions thereof to persons not made parties to this suit by a statement of their names, and at the time this suit was commenced and now, the individual owners under such conveyances, of lands described in Exhibit "A" to the defendant's answer, were and are very numerous."
>
> [Record 279, 280.]

All of the lands described in the decree, except a few tracts dismissed from the suit, are shown by the stipulated facts in the cause to be within the granted and 20-mile limits of the grant to the Atlantic and Pacific Railroad Company, which was located by maps of definite location, approved in the year 1872, and which grant was forfeited to the United States for its benefit by the act of Congress of July 6, 1886.

It further appears from the admitted facts and from the facts found in the final decree of the Circuit Court, which are not disputed upon this appeal, that all of the lands decreed to the United States or their value by the final decree from which this appeal has been taken, were erroneously patented to the Southern Pacific Railroad Company, as lands inuring to it, under its grant of March 3, 1871, and all of the lands are outside of the 20-mile or place limits of the Southern Pacific grant of July 27, 1866, called the "main line" grant.

See Southern Pac. v. United States, 183 U. S. 519.

Six of the tracts of the numerous lands described in the bill are also within the indemnity limits of the Southern Pacific's main-line grant of 1866, but those tracts have never been selected by the Southern Pacific as indemnity inuring under that grant, but, on the contrary, were selected and patented to it, as lands inuring under its grant of 1871, and the decree of the Circuit Court is that they were erroneously patented under the grant of 1871. [Record 244, 245, subdivision IV.]

These lands could not have been taken under the grant of 1866, called the main-line grant, because they were, at the time they were so patented to the Southern Pacific, granted to the Atlantic and Pacific Railroad, being within the place limits of that grant, and could not have been taken as indemnity by the Southern Pacific.

It has been adjudged by this court, and by the Circuit Court of Appeals, in numerous cases, that none of the lands within the 30-mile limits of the grant to the Atlantic and Pacific Railroad Company, and appertaining to that line of railroad, were granted to or can be taken

by the Southern Pacific Railroad Company, *under its grant of 1871;* and that the lands granted to the Atlantic and Pacific Railroad were forfeited solely for the benefit of the United States and not for the Southern Pacific.

United States v. Southern Pacific Railroad Company, 146 U. S. 570, 619;

Southern Pacific Railroad v. United States, 168 U. S. 1;

Southern Pacific Railroad v. United States, 183, U. S. 519;

Southern Pacific Railroad v. United States, 189 U. S 447.

It is contended, on behalf of the Government, upon the allegations of the bill, the admissions of the answers, the stipulations of the parties, and facts otherwise established, that the Government is entitled to a decree for the relief sought by it and granted by the courts below.

The lands embraced in the present bill were formerly involved in a case brought by the United States against the Southern Pacific Railroad, in the Circuit Court for the Southern District of California, numbered 600, to vacate patents to such lands, and as the bill alleges in the present case, those lands were dismissed from the former suit "*without prejudice*" [record 16], and it is so stipulated [record 706, 707].

The reason why they were thus dismissed without prejudice was because it appeared that the whole or a part of such lands had been sold by the Southern Pacific Railroad Company, and it was contended in the answer filed by that company that such lands had passed into the hands of *bona fide* purchasers, who were not par-

ties to that cause, and were not before the court, and therefore no decree could be entered as to such lands, which would affect such absent parties.

Thereupon the lands were dismissed from the suit without prejudice, and the present bill was filed bringing in such purchasers, or sufficient of them to fairly represent the whole, and praying for an accounting from the railroad for the value of the lands so sold and in the hands of such *bona fide* purchasers

The two suits were not similar in their objects, and if they were, it would be wholly immaterial to the determination of the present case, because the dismissal was made without prejudice.

POINTS AND AUTHORITIES.

FIRST.

The right of the defendants to object to the jurisdiction in equity has been waived.

The defendants answered to the merits without demurrer or plea to the jurisdiction in equity, and have put the Government to the expense of taking of testimony, and the cause has been submitted and tried upon the merits.

Under these circumstances the defendants have waived any right to object to the final determination in this cause, as one in equity, the court having power to grant the relief sought.

Brown v. Lake Superior Co., 134 U. S. 530, 535, 536;

Insley v. United States, 150 U. S. 512, 515, 516;

Perrego v. Dodge, 163 U. S. 160, 164;
Kilbourn v. Sunderland, 130, U. S. 505, 514.

SECOND.

This bill is cognizable in equity as one to relieve against a mistake and error in issuing patents to defendant for lands not granted by the act of Congress, and to establish a trust against and accounting for the proceeds of sales of such lands, they or most of them having been sold to bona fide purchasers. Equity not only takes jurisdiction but will grant the relief sought.

(1) The bill alleges and the case shows that these lands were excepted from the grant to the defendant railroad by the terms of the acts of Congress of March 3, 1871, and July 27, 1866, they having been granted to and set apart for the Atlantic and Pacific Railroad Company, but were erroneously patented to the Southern Pacific.

United States v. Southern Pacific Railroad, 146 U. S. 570, 619;
Southern Pacific Railroad v. United States, 168 U. S. 1.

The right of the United States to vacate and annul patents erroneously issued by the Land Department by bill in equity, is sustained by an unbroken line of authority.

United States v. Stone, 2 Wall. 525, 535;
United States v. Minor, 114 U. S. 233;
Mullan v. United States, 118 U. S. 271;

United States v. Bell, &c. Company, 128 U. S. 315, 362;

Colorado &c. Co. v. United States, 123 U. S. 307, 313;

United States v. Southern Pacific R. R., 146 U. S. 570, 619;

Wisconsin Railroad v. United States, 164 U. S. 190, 211;

Germania Iron Co. v. United States, 165 U. S., 379, 383.

The jurisdiction in such cases is maintained in equity as arising in fraud, accident or mistake.

Whether the mistake is of law or of fact is of no consequence in cases of this character, for the reason that the officers of the Interior Department, who exercise ministerial powers, cannot bind the United States by their unauthorized acts.

In Mullan v. United States, 118 U. S., at page 278, the court holding that patents erroneously issued could be vacated by a bill in equity, said:

> "It is no doubt true that the actual character of the lands was as well known at the Department of the Interior, as it was anywhere else, and that the Secretary approved the lists, not because he was mistaken about the facts, but because he was of opinion that coal lands were not mineral lands within the meaning of the act of 1853, and that they were open to selection by the state, but this does not alter the case. The list was certified without authority of law, and therefore by a mistake against which relief in equity may be afforded."

In Wisconsin Central Railroad v. United States, 164 U. S., at page 209, the court quoted the above extract

from the Mullan case, with approval, and reasserted the principle. See also:

Story's Eq. Jur., Sec. 134.

Indeed, in every case which has been brought by the United States to vacate patents to lands which were excepted from the operation of a grant by Congress to a railroad or other person, the suit has been founded and maintained because of error of law in the officers of the Interior Department.

(2) The patents to these lands were issued to the Southern Pacific Railroad Company erroneously and under a mistake by the officers of the Interior Department. The railroad company has sold most of them to *bona fide* purchasers, and by reason of the acts of the defendant railroad company the lands cannot be recovered by the United States, but these acts of the defendant do not defeat the power of a court of equity to grant relief, nor do they relieve the defendant from its trusteeship and liability to make restitution to the government.

One of the objects of this suit is to determine the title to the lands as between the United States and the defendants, claiming to be *bona fide* purchasers from the Southern Pacific Railroad Company.

The act of Congress of March 2, 1896, relating to the adjustment of railroad land grants, (see appendix), expressly authorizes in section 3 any person claiming to be a *bona fide* purchaser from a railroad company, of lands erroneously patented to the company and sold by it, to maintain a suit in the United States courts against the United States to secure a confirmation of his title.

The United States also has a right to maintain a bill in equity to quiet and determine title to lands claimed adversely to the government.

The Statutes of California, Code of Civil Procedure, Section 738, authorizes suits in equity to quiet and determine title to lands.

Pennie v. Hildredth, 81 Cal. 127, 130;
Pierce v. Felter, 53 Cal. 18.

It is well settled that the federal courts will administer such relief in equity where authorized by state statute.

Reynolds v. Crawfordsville, 112 U. S. 405, 412;
Chapman v. Brewer, 114 U. S. 158, 170, 171;
More v. Steinbach, 127 U. S. 70, 84;
Hammer v. Garfield, 130 U. S. 291, 295.

THIRD.

This bill is cognizable in equity as one brought to avoid multiplicity of suits.

The numerous parties defendant in this cause might each independently and separately have maintained an action against the United States to determine title to the lands described in the bill and claimed by such defendant. Such a proceeding is authorized by the act of Congress of March 2, 1896, and but for this bill presenting the entire matter in a single suit, it may fairly be presumed that such numerous independent proceedings would have been brought. This suit in equity is

therefore maintainable as one to avoid multiplicity, the defendants all claiming under the same title.

Pomeroy's Eq. Jur., 255, 256, 269;
Brown v. Guarantee Trust Co., 128 U. S. 403, 410;
Ogden v. Armstrong, 168 U. S. 224, 237;
Smyth v. Ames, 169 U. S. 466;
Hayden v. Thompson (8 C. C. A.), 71 Fed. 60, 67;
Kelley v. Boettcher (8 C. C. A.), 85 Fed. 55, 64;
Barcus v. Gates (4 C. C. A.), 89 Fed. 783, 791;
Bailey v. Tillinghast, 99 Fed. 801 (C. C. A.);
Whitehead v. Sweet, 126 Cal. 67, 75, 76;
Southern Pacific Company v. Robinson, 132 Cal. 408.

It appears, by all the authorities, including the above, that it is not necessary that the defendants should have a common or joint interest in the subject matter of the suit, but they may be joined in a single suit, to avoid multiplicity, when there is a question of fact or of law common to all.

In the present suit the defendants all claim title under the act of Congress of March 3, 1871, and they all claim to be *bona fide* purchasers under similar facts, and under the provisions of the acts of Congress of March 3, 1887, and March 2, 1896.

Not only are the questions of law common to all of the defendants, but the questions of fact are similar in each case; and, moreover, the defendants all claim under the Southern Pacific Railroad Company, a common source of title.

It is, therefore, submitted that this case is cognizable

in equity to avoid multiplicity of suits, if for no other reason, and if upon no other grounds.

(2) Where it is impracticable to make all the persons who are interested parties defendant, the court may proceed to a final decree, where such persons are sufficiently represented by others.

As shown by the evidence, the 213 purchasers have subdivided the lands sold to them, in numerous instances, and the present claimants of the lands so subdivided are very numerous and it is so stipulated.

It is obvious that it would be impracticable to bring all these persons before the court, who must be several hundred, in addition to the 213 original purchasers.

The defendants before the court fairly represent a class of purchasers claiming protection under the acts of 1887 and 1896, and the courts below so found, and in such a case the court may proceed to a final decree.

Equity Rules, 48;

Story's Eq. Pl., secs. 95, 97;

Davis v. Gray, 16 Wall. 203, at pp. 232, 233.

FOURTH.

Special jurisdiction in equity has been conferred by Congress upon the Circuit Court to confirm titles of bona fide purchasers and render judgment against the railroad company for value of lands.

The act of Congress of March 2, 1896, specially provides that if the court shall find that lands erroneously patented have been sold to *bona fide* purchasers, and such purchasers are before the court, that it shall confirm the

title of the purchasers and render judgment in favor of the government for the value of the land, not exceeding the ordinary government price.

This is a constitutional exercise of power by Congress and creates an additional and new ground of equity which may be administered.

Holland v. Challen, 110 U. S. 15;
Arndt v. Griggs, 134, U. S. 316, 320;
Bardon v. Land Co., 157 U. S. 327, 330;
Cowley v. Railroad Co., 159 U. S. 569, 583;

FIFTH.

It is a well settled principle in equity that where land or other property has been transferred from one to another wrongfully or under a mistake, that the court will establish and construct a trust in the property, and in its proceeds, in favor of the beneficiary, and against the person wrongfully holding it, and will require the trustee to return the property or its value.

In the present case the lands were excepted from the Southern Pacific grant. The railroad company had no right to them, and that fact was known to the company as matter of law.

It was not within the *intention* of the United States to convey them to the defendant, and that intent is shown by the granting act.

The defendant is therefore bound in equity to reconvey the lands to the United States if still within its

power to do so, and if not, then to pay to the United States what it received for them, or their reasonable value. This duty is required as a matter of justice, and its enforcement is decreed by an unbroken line of authority:

Chapman v. Douglas County, 107 U. S. 348, 360;
Perry on Trusts, Sec. 186;
Story's Eq. Jur., Secs. 134, 1261, 1263;
Pomeroy's Equity Jurisp., Secs. 155, 156, 1044;
May v. Le Claire, 11 Wall. 217, 236;
Cook v. Tullis, 18 Wall. 332; 341, 342;
Angle v. Chicago Rd,. 151 U. S. 1, 26, 27;
Townsend v. Vanderwerker, 160 U. S. 171, 179;
New Orleans v. Warner, 175 U. S. 120, 129;
Clews v. Jamieson, 182 U. S. 461, 479.

In Chapman v. Douglas County, 107 U. S. 348, 360, quoting from Hill on Trustees, 144, the court said:

> "That whenever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner so as to convert him into a trustee for the parties who in equity are entitled to beneficial enjoyment."

In that case certain property had been conveyed to Douglas County, under a mistake arising out of a misinterpretation of a state statute, and this court, by its decision and mandate, required Douglas County to reconvey the land, or pay over a money compensation in lieu of the land, within a time fixed in the decree.

The provisions of the California Statutes are in full harmony with the general principles of equity governing such transactions.

It is provided in Civil Code of California, Sections 2224, 2229 and 2237, as follows:

> "Sec. 2224. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right therto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.
>
> "Sec. 2229. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner.
>
> "Sec. 2237. A trustee who uses or disposes of the trust property, contrary to section 2229, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds, with interest."

In Taylor v. Benham, 5 How. 233 at page 274, where a trustee had disposed of trust property, the court said:

> "So, every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or in equity, as a trustee, for a breach of trust." Kane v. Bloodgood, 7 Johns. Ch. Rep. 110; Scott v. Surman, Willes 404; Shakeshaft's case, 3 Bro. Ch. Cas. 198.
>
> "He is liable, then, first, on the ground that the *cestui que* trusts might confirm the sale and resort to the proceeds, as they finally did in this case. Story's Eq. Jurisp. Sec. 1262; 2 Johns. Ch. R. 442; 1 *ibid.* 581."

See also Story's Eq. Pl., Sec. 221.

In Perry on Trusts, section 186, it is said:

> "If a deed is drawn by accident or mistake to embrace property not intended by the parties, equity will construe the grantee to be a trustee and will execute the trust by reforming the deed, or by ordering a re-conveyance. It would be against natural right to allow a person to hold property which he never intended to buy, and which has come to him by such mistake."

In Pomeroy's Equity Jurisprudence, it is said at Sections 155 and 1044:

> "Section 155. The second great division of trusts, and the one which in this country especially affords the widest field for the jurisdiction of equity in granting its special remedies so superior to mere recoveries of damages, embraces those which arise by operation of law from the deeds, wills, contracts, acts or conduct of parties, without any *express* intention, and often without *any* intention, but always without any words of declaration or creation. They are of two species, 'resulting' and 'constructive,' which latter are sometimes called trusts *ex maleficio;* and both these species are properly described by the generic term 'implied trusts.' * *
>
> "If one party obtains the legal title to property not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." * * *
>
> "Section 1044. Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and

in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied written or verbal declaration of the trust. They arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. As the trusts of this class are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed *trusts in invitum;* and this phrase furnishes a criterion generally accurate and sufficient for determining what trusts are truly 'constructive.'"

When once the property has been acquired by mistake and under circumstances in which a court of equity for purposes of justice decrees the existence of a trust, such trust follows the proceeds derived from such property in whatsoever form received.

The beneficiary is not bound by the acts of the trustee, but has an option to recover the property if not transferred, or if sold to *bona fide* purchasers to confirm the sale, and seize upon the proceeds.

Story's Eq. Pl., Sec. 221.

The principle is stated in Story's Equity Jurisprudence, at Section 1262, as follows:

"In cases of this sort, the *cestui que trust* (the beneficiary) is not at all bound by the act of the other party. He has therefore an option to insist upon taking the property; or he may disclaim any title thereto, and proceed upon any other remedies, to which he is entitled, either *in rem* or *in personam*. The substituted fund is only liable to his option. But he cannot insist upon opposite and repugnant rights. Thus, for example, if a trustee

of land has sold the land, in violation of his trust, the beneficiary cannot insist upon having the land, and also the notes given for the purchase money; for, by taking the latter, at least, so far as it respects the purchaser, he must be deemed to affirm the sale. On the other hand, by following his title in the land, he repudiates the sale."

In May v. LeClaire, 11 Wall, at pages 236 and 237, the court said:

"There are kindred principles in equity jurisprudence whence, indeed, these rules of the common law seem to have been derived. Where a trustee has abused his trust in the same manner the *cestui que trust* has the option to take the original or the substituted property; and if either has passed into the hands of a *bona fide* purchaser without notice, then its value in money. If the trust property comes back into the hands of the trustee, that fact does not affect the rights of *cestui que trust*. The cardinal principle is that the wrong-doer shall derive no benefit from his wrong. The entire profits belong to the *cestui que trust*, and equity will so mould and apply the remedy as to give them to him.

* * * * * * * * * * * * *

"In this case more than half the residuary devisees of Antoine LeClaire are not before us. We cannot, therefore, decree the conveyance of real estate, but his legal representatives are before us, and we can give a money decree against them, embracing the value of the land, which we might otherwise adjudge to be conveyed."

* * * * * * * * * * * * *

"All those securities, including the collaterals, belonged in equity to May from the time they were deposited with Cook & Sargent. LeClaire had no right to change their form or to dispose of them, as was done in carrying out the compromise agreement. It is within the power of this court, in the exercise of its equitable jurisdiction, to annul that arrangement, and hold Davenport and LeClaire's

estate liable in all respects as if the compromise had not been made. *But it is also in our power to confirm the transaction, and upon the principles of constructive trusts, to give May its fruits instead of pursuing the effects themselves. This, as the case is presented in the record, we deem the proper course.*"

In Cook v. Tullis, 18 Wall. at page 342, the court said:

"that property acquired by a wrongful appropriation of other property covered by a trust, is itself subject to the same trust. It cannot alter the case that the newly acquired property, instead of being purchased with the proceeds of the original property, is obtained by a direct exchange for it. The real question in both cases is, what has taken the place of the property in its original form?"

In Clews v. Jamieson, 182 U. S. at pages 479, 480, the court said:

"Pomeroy in his work on Equity Jurisprudence, second edition, instances among other equitable estates and interests which come within the jurisdiction of a court of equity, those of trusts. In volume 1, at section 151, he says: 'The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience; and it has been extended so as to embrace not only lands, but chattels, funds of every kind, things in action, and moneys.'

"All possible trusts, whether express or implied, are within the jurisdiction of the chancellor. In this case the committee, as trustee, was charged with the performance of some active and substantial duty in respect to the management and payment of the funds in its hands, and it was its duty to see that the objects of its creation were properly accomplished. The fact that the relief demanded is a

recovery of money only, is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give 'depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest or estate of the *cestui que trust,* and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the *final* relief to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein.' I Pom. Eq. Jur. Sec. 158."

SIXTH.

This bill is maintainable in equity as one for an accounting and for discovery.

The bill of complaint alleges that numerous tracts of land described in Exhibits A and B to the bill, and containing some 30,000 acres, had been erroneously patented to, and that 16,000 in Exhibit B were sold by, the railroad company to numerous persons, they being purchasers in good faith, which lands were excepted from the grant to the Southern Pacific Railroad Company, and the title of which purchasers was confirmed to them by the acts of Congress of 1887 and 1896.

The bill further requires certain interrogatories to be answered by the defendant railroad under oath, setting forth the sales and dates of sales of said lands, names of purchasers, dates of transfers, form of contract, agreed purchase price, date and amount of each payment of principal and of interest, and other matters [record 38, 39].

The answer of the defendant railroad makes full discovery of the amount and description of lands patented and sold, and the amount received by the company.

The answer of the Southern Pacific shows that of the lands described in the bill there have been 213 separate sales made by the defendant of various bodies of land, to 213 persons, for different amounts and upon different dates, and shows that there is great complexity in determining the amounts received by the railroad, the terms of the contracts of sale, dates of payments, amounts due the government, and *bona fides* of the purchasers, and that such sales were made to different persons at different prices and upon various dates, during a period of fourteen years, and that such sales were made upon contracts, each calling for five different payments during a course of five different years upon each sale.

It is not difficult to see, in the light of the authorities, that the complexity existing concerning these accounts through such a long period of years is such as to give a court of equity jurisdiction for an accounting and for discovery, under the well-settled principles appertaining to equity jurisprudence.

Although the account is very complex, and for that reason is maintainable in equity, the pleadings also show that the accounts are mutual, because under the statute of 1896 there is credit given to the railroad company upon each sale, (1) of all amounts in excess of $1.25 per acre, and (2), in cases where sales have been made at less than $1.25 per acre there is a credit given for the difference between the amount received by the railroad company and the price of $1.25 per acre.

So that the account upon one side is the amounts received by the railroad company in the vast number of sales which it has made, and upon the numerous dates mentioned and numerous payments made, and on the other side are the credits given by the acts of Congress.

The jurisdiction of courts of equity in matters of account and discovery are stated in Story's Equity Jurisprudence, sections 441, 442, 443 and 456, as follows:

ACCOUNT.

"441. Having disposed of these three great heads of concurrent equitable jurisdiction in matters of accident, mistake, and fraud, the undisputed possession of which has belonged to courts of equity from the earliest period which can be traced out in our juridical annals, we may now pass to others of a different and less extensive character. We allude to the heads where the jurisdiction, although it may attach upon any or all of the grounds above mentioned, is not necessarily dependent upon them, and, in fact, is exercised in a variety of cases where they do not apply, upon another distinct ground, namely, that the subject-matter is, *per se*, within the scope of equitable jurisdiction. Among these are matters of *account*.

* * * * * * * * * * * * * *

"442. Let us begin with matters of ACCOUNT. One of the most ancient forms of action at the common law is the action of account. But the modes of proceeding in that action, although aided from time to time by statutable provisions, were found so very dilatory, inconvenient and unsatisfactory that as soon as courts of equity began to assume jurisdiction in matters of account, as they did at a very early period, the remedy at law began to decline; and, although some efforts have been made in modern times to resuscitate it, it has in England fallen into almost total disuse.

* * * * * * * * * * * * * *

"443. The difficulties in the modes of proceeding in actions of account, and the convenience of the modes of proceeding in suits in equity, to attain the ends of substantial justice, are stated in an elementary work of solid reputation, with great clearness and force. The language of the learned author is as follows: 'The proceedings in this action being difficult, dilatory and expensive, it is now seldom used, especially if the party have other remedy, as debt, covenant, case; or if the demand be of consequence, and the matter of an intricate nature; for, in such case, it is more advisable to resort to a court of equity, where matters of account are more commodiously adjusted, and determined more advantageously for both parties; the plaintiff being entitled to a discovery of books, papers and the defendant's oath; and, on the other hand, the defendant being allowed to discount the sums paid or expended by him; to discharge himself of sums under forty shillings by his own oath; and if by answer or other writing he charges himself, by the same to discharge himself, which will be good, if there be no other evidence.'"

* * * * * * * * * * * * * *

DISCOVERY.

"456. The doctrine now generally (perhaps not universally) held in America, is (as we have seen), that in all cases where a court of equity has jurisdiction for discovery, and the discovery is effectual, that becomes a sufficient foundation upon which the court may proceed to grant full relief. In other words, where the court has legitimately acquired jurisdiction over the cause for the purpose of discovery, it will, to prevent multiplicity of suits, entertain the suit also for relief."

In Pomeroy's Equity Jurisprudence, sections 1420, 1421, the principles are stated as follows:

ACCOUNT AND DISCOVERY.

"1420. ORIGIN OF THE EQUITABLE JURISDICTION.—The action of account-render was one of the most ancient actions known to the common law. From the narrow scope and technical rules of this action, the inability of common-law courts to obtain a discovery from the defendant on his oath, the difficulty met with in cases of mutual and complicated accounts, and the impossibility of otherwise doing complete justice, it is easy to understand why the action of account-render fell into disuse, and a jurisdiction in equity to entertain suits for an accounting grew up."

* * * * * * * * * * * * * *

"1421. EXTENT OF THE EQUITABLE JURISDICTION.—WHEN EXERCISED.—The instances in which the legal remedies are held to be inadequate and therefore a suit in equity for an accounting proper, are: 1. Where there are mutual accounts between the plaintiff and the defendant; that is, where each of the two parties has received and paid on account of the other. 2. Where the accounts are all on one side, but there are circum-

stances of great complication, or difficulties in the way of adequate relief at law; 3. Where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account. A plea of stated account obviously constitutes a bar to a suit in equity for an accounting, since in that case the remedy at law is entirely adequate; but of course a stated account may be opened for fraud or error. The remedy of accounting is in most instances a necessary incident and part of the relief granted in suits brought by those beneficially interested, against trustees, either express or implied, and persons standing in fiduciary relations, such as administrators, executors, guardians, directors, and the like."

In Kirby v. Lake Shore Railroad, 120 U. S. 130, 134, 138, the court said:

"The case made by the plaintiff is clearly one of which a court of equity may take cognizance. *The complicated nature of the accounts between the parties constitutes itself a sufficient ground for going into equity.* It would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved in the settlements between the parties, and reach a satisfactory conclusion as to the amount of drawbacks to which Alexander & Co. were entitled on each settlement. 1 Story Eq. Juris. Sec. 451. Justice could not be done except by employing the methods of investigation peculiar to courts of equity."

* * * * * * * * * * * * *

"The equity jurisdiction of the courts of the United States is the same that the High Court of Chancery in England possesses, is subject to neither limitation or restraint by state legislation, and is uniform throughout the different states of the Union."

In Colonial Mortgage Co. v. Hutchinson Mortgage Company, 44 Fed. 219, 221, Judge Shiras said:

> "it is clear that the complainant has the right to call the defendant corporation to an account for the manner in which it has performed, or failed to perform, the trust confided to it; and, as it is apparent that such accounting involves many and complex questions including the disposition to be made of the mortgages tendered back to the defendant, the expenses connected therewith, the sums received as interest thereon, and the compensation, if any, due to the defendant, it follows that not only by reason of the right of complainant to call for a settlement of the trust but *also by reason of the complexity of the account to be settled, and the disposition to be made of the mortgages in question, there exists grounds for the exercise of equitable jurisdiction.*"

The jurisdiction of courts of equity in matters of *account* is well settled, especially where discovery is sought, and always where discovery is made.

Kilbourne v. Sunderland, 130 U. S., 514, 515.

United States v. Old Settlers, 148 U. S., 427, 465.

Fowle v. Lawrason, 5 Pet. 495.

Magic & Co. v. Elm, 14 Blatch., 114.

Kelley v. Boettcher, 85 Fed. 55, C. C. A.

Gas Co. v. Indianapolis, 90 Fed. 196.

McMullen v. Strother, 136 Fed. 295, C. C. A.

The numerous authorities, upon equity jurisprudence, clearly show that the rules governing the jurisdiction in the United States and, in England, are identical, and that jurisdiction is established (1) when the accounts are mutual, (2) when the accounts are not mutual but involve complexity, and (3) where there is neither mutuality in the accounts nor complexity, but a discovery is sought and obtained.

Upon each and all of these grounds the present suit is maintainable in equity.

SEVENTH.

The jurisdiction in equity in this case is sustained because the final relief sought and the mode of obtaining it is more efficient than in a court of law.

Oelrichs v. Spain, 15 Wall. 211, 228;
Kilbourn v. Sunderland, 130 U. S. 505, 514, 515;
Joy v. St. Louis, 138 U. S. 1, 11, 50;
United States v. Old Settlers, 148 U. S. 427, 465;
United States v. Union Pacific Railroad, 160 U. S. 1, 51, 52;
Chicago Railroad v. Union Pacific Railroad, 47 Fed. 15, 26;
United States v. Union Pacific Railroad, 50 Fed. 28, 43.

In view of the complications existing in this case, it is obvious that a jury could be of no possible aid to the court, but, on the contrary, would be an impediment to the speedy determination of this cause, and therefore the final relief and mode of obtaining it is more efficient than at law.

This court is called upon to determine (1) the rights of the respective parties under the acts of Congress of July 27, 1866, and March 3, 1871, granting lands to the defendant railroad, and construe those acts which statutes are not only laws, but contracts; (2) to determine the rights of the respective parties under the act of

Congress of July 6, 1886, forfeiting and restoring to the public domain the lands and rights to lands granted to the Atlantic and Pacific Railroad, and interpret that act; (3) to determine the rights of the respective parties under, and construe the acts of Congress of March 3, 1887, February 12, 1896, and March 2, 1896, protecting the rights of *bona fide* purchasers of the railroad of lands erroneously patented, and providing for re-payment to the United States of the value of the lands, not exceeding the minimum government price or amount received by the railroad; (4) to determine the effect as *res adjudicata* of the decisions and decrees of the Supreme Court of the United States in the former litigations between the United States and the Southern Pacific Railroad Company, reported in 146 U. S. 570, 615, 619, and 168 U. S. 1, 66; (5) to determine the effect as an estoppel upon the claims of the Southern Pacific Railroad Company, in virtue of the former litigations and answers filed by it alleging that these lands had been sold to *bona fide* purchasers and otherwise seeking by such answers to protect such purchasers; (6) the construction and effect of the deeds and contracts of sale executed by the Southern Pacific Railroad to very numerous persons; (7) to determine whether an equitable trust does not exist in favor of the government and against the railroad for the government value of the lands which the railroad company has received from sales to *bona fide* purchasers, and whether the acts of Congress above mentioned do not, in effect, provide for an apportionment or division of such fund to the extent of giving the government the minimum government price

out of such proceeds of sales; (8) an accounting embracing a period of real estate transactions during a period of fourteen years, covering more than 213 separate sales of lands of which each sale usually covers numerous tracts, and embracing something over 1000 different payments made by the respective purchasers; and finally, the enforcement by this court of contracts and equitable obligations by a corporation created by the United States for governmental functions in pursuance of acts of Congress under and by virtue of which mutual duties and obligations were required.

In support of the principle here contended for, the following extracts from the authorities are made:

In Oelrichs v. Spain, 15 Wall., at page 228, the court said:

> "The 16th section of the Judiciary Act of 1789 provides, 'that suits in equity shall not be sustained in any case where plain, adequate and complete remedy can be had at law,' but this is merely declaratory of the pre-existing rule, and does not apply where the remedy is not 'plain, adequate, and complete;' or, in other words, 'where it is not as practical and efficient to the ends of justice and to its prompt administration, as the remedy in equity.'"

In Kilbourn v. Sunderland, 130 U. S., at pages 514 and 515, which was a suit for an accounting, the court said:

> "The point is also pressed that the remedy at law was plain, adequate and complete, and jurisdiction in equity therefore wanting."
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> * * * * * * * * * * * * *
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> "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief *and the mode of obtaining it,* is as efficient as the rem-

edy which equity would confer under the same circumstances."

* * * * * * * * * * * * * *

"'There cannot be any real doubt that the remedy in equity, *in cases of account*, is generally more complete and adequate than it is or can be at law.' 1 Story's Eq. Jur. Sec. 450; and as the remedy at law in the case in hand was rendered embarrassed and doubtful by the conduct of the defendants, and fraud has in equity a more extensive signification than at law, and, as charged here, involved the consideration of the principles applicable to fiduciary and trust relations between the parties throughout the period of their connection, we concur with the Supreme Court of the District in sustaining the jurisdiction."

In Joy v. St. Louis, 138 U. S. at page 50, the court said:

"Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation."

In United States v. Old Settlers, 148 U. S. 427, 465, the court sustained the jurisdiction in equity in that cause, as one arising upon *account*, and without any other complications or grounds of equity, and the court said, at page 465:

"The remedy in equity, *in cases of account*, is generally more complete and adequate than it is or can be at law; 1 Story Eq. Jur. Sec. 450; Kilbourn v. Sunderland, 130 U. S. 505; and we regard the lan-

guage of the act of Congress as manifestly used with the intention that equity powers should be exercised in the disposition of the case. It was upon this view that we directed the *certiorari* to issue, and in arriving at our conclusions, while we have had the advantage of the findings of the Court of Claims we have considered and determined the case for ourselves upon an examination of the entire evidence."

In United States v. Union Pacific Railway, 160 U. S. at pages 51, 52, the court said:

"In Boyce v. Grundy, 3 Pet. 210, 215, this court said: 'It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' The circumstances of each case must determine the application of the rule. Watson v. Sutherland, 5 Wall. 74, 79. In Oelrichs v. Spain, 15 Wall. 211, 228, an objection was raised that the remedy at law was ample. The court observing that the remedy at law was not as effectual as in equity, said, among other things, that a 'direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation.'"

* * * * * * * * * * * * *

"These principles are abundantly sustained by the authorities. In 1 Pomeroy's Equity Jurisprudence, Sec. 181, many adjudged cases are cited in support of the proposition that, 'if the controversy contains any equitable feature, or requires any *purely equitable relief* which would belong to the *exclusive* jurisdiction, or involves any matter pertaining to the *concurrent jurisdiction*, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights, and grant legal remedies which

would otherwise be beyond the scope of its authority.'"

In Chicago Railroad v. Union Pacific Railway, 47 Fed., at page 26, Justice Brewer said:

> "I believe most thoroughly that the powers of *a court of equity* are as vast and its processes and procedure as elastic as all the changing emergencies of increasingly complex business relations and the protection of rights can demand."
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> * * * * * * * * * * * * * *
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> "They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop state or nation from spoilating or destroying private rights; to grasp with strong hand every corporation, and compel it to perform its contracts of every nature and do justice to every individual."

EIGHTH.

The legislation of Congress, acts of 1866 and 1871, for the construction of the railroad, its public uses, grant of lands, and their sale by the road, and requiring re-payment of value of lands erroneously patented as required by the acts of 1887 and 1896, shows that the railroad company was a trustee of the government for those purposes.

The purpose of the United States by the acts of July 27, 1866 and March 3, 1871, was to cause the construction of a national highway for the purposes as expressed in the act, of providing for the transportation of troops, munitions of war, public stores, and the mails, and to secure the construction of the road a large grant of land

was made to the company, which it was authorized to sell and devote the proceeds for construction purposes, or to mortgage for that purpose, and was required to repay the value of lands erroneously patented and sold by it.

The railroad company was constituted a public agent or trustee of the United States to carry out those acts for a public purpose.

United States v. Michigan, 190 U. S. 379;
California v. Southern Pacific Railroad, 127 U. S. 1;
United States v. Union Pac. Rd., 160 U. S. 1.

And the power and right to consummate those ends were franchises conferred by the United States for national purposes.

It was not unusual in adjusting these enormous land grants for quantities of land to be erroneously patented to the railroads, and so by the amendatory acts of March 3, 1887, and March 2, 1896, Congress provided for a repayment to the United States of the government price of such lands as might be erroneously patented and sold by the company to *bona fide* purchasers.

The whole scope of the legislation shows that the railroad company was a trustee for the United States, not only of the lands and rights conferred, but of surplus moneys received from the sale of lands erroneously patented.

In United States v. Michigan, 190 U. S. 396, 401, 405, the court held that the state of Michigan, to which state a grant of lands had been made to aid in the construction of a canal, was a trustee for the United States of the sur-

plus moneys received from the sale of lands granted to aid in the construction.

The court said in that case:

> "Whether under these circumstances technical words were used to express the thought that the state was to be a trustee, is not important, if upon a reading of the statutes and a survey of the conditions of the country when the acts were passed, it is apparent that the intent was that the state should occupy the position of trustee in the construction and operation of the canal."

And the court further said:

> "The general purpose of these statutes was to build a ship canal by means of the funds procured from the sale or other disposition of the public lands of the United States, to be used by all those whose business or pleasure should call them to pass through it in order to reach their destination."
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> * * * * * * * * * * * * *
>
> "Where Congress grants land to a state to be used as provided in this statute we think a trust, or power to dispose of the lands for the purpose of carrying out the improvement is granted; and in this case no beneficial interest passes to the state by the language used, considering the whole statute."
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> * * * * * * * * * * * * *
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> "We are of opinion that the bill shows a cause of action against the state of Michigan as trustee, and its liability to pay over the surplus moneys (if any), which, upon an accounting, it may appear, have arisen from the sale of the granted lands, over and above all cost of the construction of the canal and the necessary work appertaining thereto, and the supervision thereof, together with the surplus money arising from the tolls collected, which latter sum by the demurrer is admitted to amount to $68,927.12."

The court therefore held that as the suit involved the establishment and enforcement of a trust, it was cognizable in equity.

There is no difference in principle between the case of the United States v. Michigan and the present suit. The former made a grant of lands to aid in the construction of a canal, and in the present case Congress made a grant of lands to aid in the construction of a railroad, and constituted the company a national agency.

In both cases the grantee exercised franchises under the United States and was constituted a public agency for a national purpose, and in each case the grantee exercising these powers and franchises was a trustee of the United States and bound to account to and pay over to the government the surplus moneys arising from the sale of lands.

There was no beneficial interest passed to the Southern Pacific Railroad in the lands erroneously patented, or in the proceeds arising from their sale.

NINTH.

The principle is well settled that where a court of equity takes jurisdiction of a cause upon one ground, pertaining either to its exclusive or concurrent jurisdiction, that it will retain it to do complete justice, even to granting legal remedies.

United States v. Union Pacific Railroad Co., 160 U. S. 1 at page 52;
Ober v. Gallagher, 93 U. S. 199;
Root v. Railway, 105 U. S. 189, 205, 208;
Ward v. Todd, 103 U. S. 327;
Hopkins v. Grimshaw, 165 U. S. 342 at page 358;
Smyth v. Ames, 169 U. S. 466, 516, 517;

TENTH.

The present case is distinguished from United States v. Winona Railroad, 165 U. S. 481.

Counsel for appellants in the lower courts strongly relied upon the case of United States v. Winona Railroad, *supra*, to defeat the recovery by the United States of the government price of these lands.

That case was not brought to recover the government price, as the court states in the opinion, but counsel relied upon the following paragraph in the opinion: (165 U. S. 482).

> "that it does not appear from this record, either that the railroad company received an excess of lands, or has even received, these lands included,

the full quantity of lands promised in the grant, and further that it does not appear that there were not, within the granted or indemnity limits, lands which the company might have rightfully received, but for this erroneous certification."

The present case is different from the Winona case in the following controlling features:

(1). In the present case Congress reserved the right to amend the Southern Pacific grants of July 27, 1866, and March 3, 1871, (see section 20, act of 1866 appendix hereto) and in pursuance of such authority Congress passed the supplemental acts of March 3, 1887, and March 2, 1896, declaring in effect that the Southern Pacific Company should repay to the United States the government price of all lands erroneously patented under those grants, and sold to *bona fide* purchasers.

These acts create an express obligation on the part of the Southern Pacific to repay the government price as to such lands erroneously patented and sold to *bona fide* purchasers, whereas no such condition appears to have existed in the Winona case.

(2). In the present case the Southern Pacific has sold all, or nearly all, of these lands for a price largely in excess of $1.25 an acre, being the minimum government price and has received the benefits from such sales.

The answers in the present case, and in former litigations, which will be specifically referred to in this brief, show that the Southern Pacific has received very large benefits from the passage of the acts of 1887 and 1896, and having so accepted the benefits, it is bound by the obligations imposed by those acts to repay to the govern-

ment the price of $1.25 per acre. These conditions did not exist in the Winona case.

(3). It seems to have been assumed in the Winona case that if the Winona Railroad was required to repay to the United States the government price of those lands, it would meet with an irreparable loss by reason of the alleged fact that the Winona Railroad was entitled to select indemnity for those lands, and that the indemnity lands had been exhausted, so that no such indemnity selection could be made, and that therefore the government should not be allowed to deprive the Winona Railroad of the money value of such lands, where it had by its own acts prevented the Winona Railroad from selecting indemnity.

The lands in the present case were lands granted to the Atlantic and Pacific Railroad, and were within the granted and place limits of the Atlantic and Pacific grant. The legal title had been vested in the Atlantic and Pacific Railroad to these lands by relation as of the date of the act of July 27, 1866, and these lands had been forfeited to the United States, the title had been resumed by the government and the lands were restored to the public domain for the sole benefit of the United States, and not for the benefit of the Southern Pacific Railroad. The Southern Pacific could not take any of these lands, nor could it accept or take the value of them in any other way, or receive other benefits from the act of forfeiture.

All these matters and things had been finally and conclusively adjudged and determined by this court in former litigations.

Upon the authority of these former decisions, as well as upon general authority, the Southern Pacific was not entitled to take any of these lands in any manner, or form, or select lieu for them.

Therefore the Southern Pacific never lost any of these lands, and it has not suffered any injury by the United States cancelling patents to them, quieting title to them, or by recovering the government value in case of their sale to *bona fide* purchasers.

This absolutely controlling feature was not presented in the Winona case.

(4). Instead of there being a deficiency in the grant to the Southern Pacific, there is a large excess of lands to supply losses in the Southern Pacific grant, as appears from the following stipulation of fact:

> "It is stipulated and agreed * * * that odd sections of land, exceeding twenty thousand acres in quantity, are to be found within the indemnity limits of each of the grants made to the Southern Pacific Railroad Company, by the acts of July 27th, 1866, and March 3rd, 1871, which are subject to selections, but have not been selected by said company." [Record 279.]

It appears from the stipulation that as to the lands so situated, there are forty thousand acres within the indemnity limits of the Southern Pacific Railroad, main and branch lines, which remain unselected to this day, and which are subject to such indemnity selection.

(5). This suit is brought by the United States in pursuance of said acts of 1887 and 1896, requiring the Secretary of the Interior to adjust the several railroad land grants, and the Southern Pacific grant has not yet been

finally adjusted, so that it cannot be definitely ascertained what amount of lands it has lost, for which it might be entitled to make indemnity selections, nor what amount of indemnity lands remain.

It was decided in Oregon Railroad v. United States (189 U. S. 103, 115) that until there had been a final adjustment of the land grant it was not competent to show by other evidence that there was any deficiency in the grant.

The Southern Pacific, therefore, is in no position to say at this time that there is a deficiency.

ELEVENTH.

The acts of congress of March 3, 1887, and March 2, 1889, requiring repayment for lands erroneously patented and sold to bona fide purchasers are amendatory of the act of 1866.

By the authority reserved in Congress to alter, amend or repeal the act of July 27, 1866, (see appendix Sec. 20) Congress may pass any supplemental law, the object of which is to carry out the national purposes disclosed by the act, which mainly were to secure the construction of the road and secure to the United States the use and to adjust the grant to the railroad company, awarding to it what it is entitled to, and to the government that which is reserved.

Such supplemental acts are amendatory of the former act, the power to amend being expressly reserved.

United States v. Union Pacific Railroad, 160 U. S., 1, 32, 33;

Shields v. Ohio, 95 U. S. 319;
Wisconsin Railroad v. United States, 164 U. S. 190, 205;
United States v. Oregon Rd., 176 U. S. 47, 48.

TWELFTH.

The Southern Pacific Company has fully accepted the benefits of the acts of 1887, and 1896 and is bound by their obligations.

The confirmatory act of March 2, 1896, requiring the railroad company to repay to the United States the government price of the lands, was passed in the interests of the railroad company, and has been fully accepted and adopted by the railroad, and the company is now estopped from denying its liability.

It cannot be doubted but that the act of March 2, 1896, was for the benefit of the Southern Pacific Company. This is apparent from the fact, as shown by Exhibit "A" to defendant's answer, that the lands were sold at a price largely in excess of the government value. [Record 74-141.]

The answer alleges that the lands were so sold to *bona fide* purchasers, and that the titles of such purchasers are confirmed by the act of Congress of March 2, 1896. [Record 70, 71.] It is therefore obvious that the confirmation of the title alone will relieve the railroad company from the obligation to repay the purchase price, by reason of failure of title.

It is well settled that where an act is passed which is for the benefit, or in the interest of a corporation or per-

son, it will be presumed that the act was passed at the request of such corporation, and that the company has accepted its provisions.

In taking the benefits of the act the company, of course, is charged with its burdens.

Daniels v. Tearney, 102 U. S., 415, 421;
Grand Rapids v. Osborn, 193 U. S. 17, 29;
See also Sec. 1589 Cal. Civil Code.

In this case we are not, however, required to rely upon the legal presumption of acceptance, if that were necessary, but we have evidence in the record that the company did in fact accept the provisions of this act and claim its benefits, not alone in this suit, but in other litigations between the United States and the Southern Pacific Railroad Company.

In the supplemental answer filed by the Southern Pacific Railroad Company in the case of United States v. Southern Pacific Railroad Company, number 600 on the docket of the Circuit Court, [Record 569, 572], referring to the identical lands described in the bill in this case, the answer alleges that the lands were sold by the company to *bona fide* purchasers, and that the title of such purchasers has been confirmed, and that the United States is barred from bringing a suit to annul the title, by reason of the provisions of the act of March 2, 1896.

That part of the answer in said case, upon the subject, is as follows:

> "Before this suit was commenced, or demand made for reconveyance to the United States of any of the lands patented as aforesaid, the defendant Southern Pacific Railroad Company sold, and issued contracts and deeds of conveyance for, fifty-

seven thousand seven hundred and eleven acres of the lands conveyed to it by the said patents; the full particulars of which sales, contracts and deeds, and short particulars of the patents conveying to the said company the lands so sold, are set forth in "Exhibit A," attached to and made a part of this supplemental answer. Such sales were made, and contracts and deeds issued, to *bona fide* purchasers. * * *"

"By its act approved March 2, 1896, entitled 'An act to provide for the extension of the time within which suits may be brought to annul land patents, and for other purposes,' Congress provided that no patent to any land held by a *bona fide* purchaser should be vacated or annulled, and confirmed the right and title conveyed by such patents; and these defendants are advised and believe, and so say, that if it were in any wise true (which it is not) that the lands patented and sold as aforesaid were reserved from the lands granted to the defendant Southern Pacific Railroad Company by the said acts of Congress, as in the plaintiff's bill of complaint alleged, still this suit cannot be maintained, but is barred as to all such patented and sold lands, by the provision of the first section of the said act of March [illegible] 896."

[Record, 572, 573.]

Having accepted the benefits of this act and having secured a dismissal in said case 600, without prejudice as to the lands involved in this suit, because it had sold them, the company is charged with the performance of the obligations of the act, which is to repay to the United States the government price of the lands so erroneously patented and sold to *bona fide* purchasers.

THIRTEENTH.

Lands within the granted limits of the Atlantic and Pacific grant of July 27, 1866, cannot be taken by the Southern Pacific as indemnity under its grant of same date or later grant of March 3, 1871.

As before stated there are six tracts of land embraced in the decree of the Circuit Court which are situated within the granted or place limits of the Atlantic and Pacific of 1866, and which are also situated within the indemnity limits of the Southern Pacific grant of the same date, and are also situated within the indemnity limits of the Southern Pacific grant of 1871.

These six tracts, as found by the courts below, and as adjudged in the decree, were patented to the Southern Pacific Company under selections made by it *as a part of its grant of* 1871, and those patents were therefore erroneously issued. (See decree, Subd. IV., record 244, 245, 246.)

(a). These lands were in fact selected by the Southern Pacific and patented by the United States to that company as a part of the grant of March 3, 1871, and not under any other grant or claim of title.

This court definitely decided and determined, in the former litigations, that the Southern Pacific Company could not take such lands under its grant of 1871.

United States v. Southern Pacific Railroad Company, 146 U. S., 570, 615, 619;

Southern Pacific Railroad Company v. United States, 168 U. S. 1, 46, 47.

The action of the Interior Department in patenting these lands under the act of 1871, was therefore erroneous, and it is no defense for the Southern Pacific Railroad Company to now say that it might possibly have claimed these lands under some other grant, and that such claim might possibly have been allowed by the Interior Department.

Germania Iron Co. v. United States, 165 U. S. 379, 383.

The lands having been erroneously patented, it was proper for the Circuit Court to vacate the patents, and the adjustment act of 1887 and 1896 expressly provided that where such patents have been erroneously issued, and the lands have been sold to *bona fide* purchasers, the government shall be entitled to a judgment for the ordinary minimum price.

(b). It is a conceded fact that these six tracts of land were granted to the Atlantic and Pacific Railroad Company as a part of its primary or place lands, and that the legal title vested in that company as of date of the act of July 27, 1866, and that the Southern Pacific Railroad Company could under no circumstances have taken or held any of these tracts as against the Atlantic and Pacific Railroad Company, and it has been finally and conclusively adjudged and determined by this court in former litigations in the construction of the Atlantic and Pacific grant, and in the act forfeiting that grant of July 6, 1886, that the forfeiture of that grant was for the sole benefit of the United States, and that the Southern Pacific Railroad Company could not take any of those lands so forfeited.

From the conceded fact that the legal title to these lands was vested in the Atlantic and Pacific Railroad Company, and that they were forfeited for the sole benefit of the United States, it conclusively follows that these lands cannot be taken as indemnity by the Southern Pacific Railroad Company.

These lands described in the bill were set apart by act of Congress for the construction of the Atlantic and Pacific Railroad, and as these lands were granted to another railroad than the Southern Pacific for another and different object of internal improvement, the Southern Pacific cannot obtain any benefit from that grant, or by taking indemnity for them, which would amount to the same thing.

Southern Pacific v. United States, 168 U. S. 1, 47;
Clark v. Herrington, 186 U. S. 206, 208;
Southern Pacific v. United States, 189 U. S. 147, 452;
Chicago Railroad v. United States, 159 U. S. 372, at page 375;
Sioux City Railroad v. United States, 159 U. S., 349, 366;
St. Paul Railroad v. Winona Railroad, 112 U. S. 720;
Sioux City Railroad v. Chicago Railroad, 117 U. S. 406;
United States v. Missouri Railroad, 141 U. S. 358;
Southern Pacific Railroad, 6 L. D. 349, 350;
Southern Pacific Railroad, 6 L. D. 816;
Southern Pacific Railroad v. Moore, 11 L. D. 534;
Smead v. Southern Pacific, 29 L. D. 135.

The contention, issue, controversy and claim as to whether the Atlantic and Pacific grant was forfeited by the United States for the benefit of the Southern Pacific Railroad, or for the benefit solely of the United States, and whether the Southern Pacific Railroad Company can take or obtain any benefits from the forfeiture of the Atlantic and Pacific grant, have been finally and conclusively adjudged and determined against the Southern Pacific in the former litigations between the United States and said company as shown by the records in evidence in this cause, and those issues and controversies are no longer open to discussion.

United States v. Southern Pacific Railroad, 146 U. S. 570, 619;

Southern Pacific Railroad v. United States, 168 U. S. 1.

In St. Paul Railroad v. Winona Railroad, 112 U. S. 720, where lands were claimed by both roads under a grant of the same date, it was held that neither road could take *as indemnity*, lands falling within the *place limits* of the other road. This rule was reaffirmed in Sioux City Railroad v. Chicago Railroad, 117 U. S. 406.

In the cases of Chicago Railroad v. United States, 159 U. S. 372, at page 375, and Sioux City Railroad v. United States, 159 U. S. 349, 366, it was aga[illegible] that where two roads held under a grant of the [illegible] neither road could take as indemnity, lands w[illegible] place limits of the other road, although in tho[illegible] grant to the Sioux City road, or a large par[illegible] been forfeited for non-construction of the roa[illegible] Chicago Railroad attempted to select those forfeited

lands as indemnity, which the court held could not be done, and the court also held in those cases that neither road could use as a base for an indemnity selection, lands which fell within the place limits of the grant to the other railroad, although falling within its own place limits.

In the case in 146 U. S., 570, 615, 619, the court, referring to the fact that the Atlantic and Pacific had definitely located its road, and that its grant attached, said:

> "There never was a time, therefore, at which the grant of the Southern Pacific could be said to have attached to these lands and the plausible argument based thereon, made by counsel in behalf of the Southern Pacific Company falls to the ground." (146 U. S. 603.)

And again the court said:

> "Neither can it fairly be said that it was the intent of Congress that these lands should pass conditionally to the Southern Pacific Company. Good faith must be imputed to Congress. It cannot be supposed that Congress intended to give to the Southern Pacific Company that which it had already given to the Atlantic and Pacific Company." [146 U. S. 604.]

The court further said:

> "Again, there can be no question, under the authorities heretofore cited, that if the act of forfeiture had not been passed by Congress, the Atlantic and Pacific could yet construct its road, and that constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with this right of the Atlantic and Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they should be restored to the public domain. The for-

> feiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant, and now finding that the Atlantic and Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach, and a forfeiture for its own benefit. * * * * * By that act of forfeiture the title of the Atlantic and Pacific was retaken by the general government and retaken for its own benefit and not that of the Southern Pacific Company and that the latter company has no title of any kind to these lands." [146 U. S. 606, 607.]

In the latter case of Southern Pacific v. United States, 168, U. S. 1, the court reaffirmed all that it had said in regard to the construction of the Atlantic and Pacific grant, and the construction and effect of the forfeiture act of 1886.

The court did not in those cases undertake to determine the extent or validity of the Southern Pacific grant of 1866, but what it did do was to reaffirm the doctrine that the forfeiture of the Atlantic and Pacific grant, *whatever the extent of that grant may have been, was for the benefit of the United States and not for the benefit of the Southern Pacific.* The extent of the Southern Pacific grant of 1866 was determined in 183 U. S. 519.

Now, as before stated, there is no dispute as to what the extent of the Atlantic and Pacific grant was, nor can it be denied that the Atlantic and Pacific would have taken and held these lands being within its place limits, as against any claim of the Southern Pacific to select them as indemnity.

In Southern Pacific Railroad v. United States, 168 U. S. 1, 47, the court distinctly held as above pointed out, that the Southern Pacific Railroad Company could not take as indemnity, lands within its indemnity limits under the grant of 1871, which fell within the granted limits of the forfeited Atlantic and Pacific grant. That case involved lands in that precise situation (168 U. S. 46, 47) and the same argument was made in that case as is now made by appellant.

The contention of the Southern Pacific that the selection of indemnity lands attached only from the date of selection and not from the date of the grant, and that it therefore may now select the forfeited granted lands of the Atlantic and Pacific grant, is met and overthrown by this decision, because if it cannot take as indemnity under the grant of 1871 any of those lands, why should it take them as indemnity under the grant of 1866?

In Southern Pacific Railroad Company v. United States, 189 U. S. 447, 452, the Southern Pacific Railroad Company claimed a right to hold as indemnity, and to select as such indemnity when it got ready, lands falling within the indemnity limits of its grant of 1871, which also fell within the lands withdrawn on account of the grant to the Texas Pacific Railroad and the court affirmed the decree forever enjoining the Southern Pacific Railroad Company from claiming any of those lands at all. In that case the court said: [189 U. S. 451.]

> "It is argued further, however, that if the Southern Pacific did not get the lands in question under its primary grant *it may take a part of them as indemnity lands.* It is said that the company has a right to take them for that purpose if the status of

> the lands at the time of selection permits it. Ryan v. Railroad Company, 99 U. S. 382. That contention seems to be disposed of by Southern Pacific Railroad v. United States, 168 U. S., 1, 47, 66, and the practice of the land department for many years has been inconsistent with it. Southern Pacific Railroad v. Moore, 11 L. D. 534; Moore v. Kellogg, 17 L. D. 391; Smead v. Southern Pacific Railroad, 29 L. D. 135."

In that case the court also seems to have been of the opinion that the provision in the act of 1866, which authorized the Southern Pacific to make indemnity selections, forbade the selection by that company of lands granted to another road, and the court said: [See 189 U. S. 452.]

> "It is not clear that the language of the statute does not forbid it. The indemnity to the Atlantic and Pacific, by section 3 of its charter adopted for the Southern Pacific by section 18, is to be other lands 'in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers.'"

The Southern Pacific indemnity lands, as thus pointed out by the court, were to be taken from *alternate* sections from *other* lands, and from lands *not reserved*. If the exception of *reserved* lands as lands from which that company could not select indemnity did not include lands reserved for another company what reserved lands could it operate upon, as the even sections had already been eliminated, and *other* lands also were to be taken, but not reserved lands, or reserved numbers.

In Clark v. Herrington, 186 U. S. 206, 208, the court held that one railroad company could not select as in-

demnity the alternate sections within the limits of another railroad grant, which were not granted to such other railroad but which were set apart to be sold at a double minimum price on account of the railroad grant.

Now, what forbade the selection of those lands as indemnity when they were open public lands on the date when the railroad company sought to select them, in Clark v. Herrington? Nothing forbade it but the principle that lands set apart for one purpose of internal improvement could not be taken for another such purpose by another company, and the court held that they could not be selected as indemnity.

This case is quoted with approval in Southern Pacific v. United States, 189 U. S. 452.

This principle was referred to in Chicago Railroad v. United States, 159 U. S. 372, at page 375, in which the court said:

> "If as matter of law and fact, these lands were never granted for the benefit of the Milwaukee road, but were granted in aid of the construction of the Sioux City road, and for no other purpose, they could never—consistently with the act of Congress—have been used by the state for the benefit of the Milwaukee road * * *. As these lands were set apart exclusively for the construction of the Sioux City road, no failure to construct that road by the state or by the corporation charged with the duty of building it could, in any case, without the assent of Congress, justify their being applied in aid of the construction of another and distinct road."

and the case of Sioux City Railroad v. United States, 159 U. S. 349, 366, sustains the principle.

It was distinctly held by Judge Lamar in the case of Southern Pacific Railroad Company, 6 L. D. 349, 350,

that the Southern Pacific Railroad Company had no right to select as indemnity, lands falling within the place limits of the forfeited Atlantic and Pacific grant and in considering that question, Judge Lamar said:

> "In considering said rule upon the answer of the company you held * * *
>
> " 'That the lands within the granted limits of the Atlantic and Pacific and the indemnity limits of the Southern Pacific "could not have been selected as indemnity by the Southern Pacific", for the reason that, although said lands were withdrawn for the Southern Pacific Company, they fell within the granted limits of the Atlantic and Pacific, upon the subsequent definite location of its road.' * * *
>
> "I see no reason for any further action by the department upon this rule except as to lands embraced within the common granted or primary limits of both roads."

In the later case of Southern Pacific Railroad Company, 6 L. D. 816, Secretary Vilas said as to lands within the indemnity limits of the Southern Pacific Railroad branch line, and within the primary limits of the grant to the Atlantic and Pacific:

> "It has been settled by the Supreme Court that lands granted to any company are not subject to selection as indemnity by another company, (112 U. S. 414, 117 U. S. 406) and I concur in your opinion that proceedings should be instituted to vacate the patents erroneously issued for such lands."

In both of these cases, Judge Lamar and Secretary Vilas concurred in this view and based the decision upon the principles laid down in the Winona case, and Sioux City case.

In the first case decided by Judge Lamar the lands were the identical lands subject to suit in this bill, claimed by the Southern Pacific as indemnity and situated within the Atlantic and Pacific place limits and in the latter case, Secretary Vilas applied the principle to the Southern Pacific branch line grant, not because of the proviso in section 23, but because of the decision by Judge Lamar and the decisions above mentioned.

FOURTEENTH.

Neither the dismissal of the lands in this suit from a former litigation, nor the adjudication in such former litigation, as to the rights and claims of the Southern Pacific under its grants, nor the adjudication of title to other lands, estops the government from maintaining this bill.

The contention appears to be made that because in a former suit brought by the United States against the Southern Pacific Railroad Company, to vacate patents to a large quantity of lands, including those described in this bill, and because the government voluntarily dismissed without prejudice from that bill the lands involved in the present suit, that such action estops the United States from maintaining the present suit. No adjudication was had in the former suit in favor of the Southern Pacific Railroad against the United States, in any wise affecting the title to these lands, nor affecting the right of either party to them.

As to this contention of the Southern Pacific the Circuit Court of Appeals for the Ninth Circuit said concerning it:

> "but a discussion of this point is wholly unnecessary, because the other suit (No. 600) as to certain lands was dismissed without prejudice, and such a dismissal cannot be pleaded in bar (Hughes v. United States, 4 Wall. 232, 237, 18 L. Ed. 303; Bunker Hill & Sullivan M. Co. v. Shoshone M. Co., 109 Fed. 504, 507, 47 C. C. A. 200, and authorities there cited) nor can it in any other manner affect the rights of the government in the present suit." [133 Fed. 661.]

(1) This point or contention has not been assigned as error of the Circuit Court below, [record 768] nor has it been assigned as error on this appeal. [Record 813-817.]

(2) The former suit was brought against the Southern Pacific Railroad Company, and the *bona fide* purchasers from that company were not parties, so that no adjudication could have been had as to the *title* to the land or rights of such *bona fide* purchasers.

The answer in the former suit averred sales by the Southern Pacific to such numerous *bona fide* purchasers and showed that no adjudication could be had as to such titles for want of proper parties. [Record 569, 572.]

In the present suit such purchasers are personally brought into court or properly represented, and the present bill seeks an adjudication as to their titles and rights, and also seeks a recovery from the railroad of the government price of such lands, so erroneously patented and sold.

It is apparent that the parties are different and that the objects of the suits are entirely different, and further, that there has been no adjudication affecting the questions now presented.

The case is not one of "splitting demands," because the *subject matter* is entirely different, being other lands.

It has been solemnly stipulated in the present case, that the dismissal of these lands in the former action was "without prejudice," [record 706, 707], and if so, such dismissal cannot prejudice the rights of the government in the present suit.

In urging this ground as an estoppel against the government from maintaining the present suit, counsel for the defendants evidently fail to comprehend the difference between a former adjudication resulting from *identity of subject matter* and *identity of issues* determined in the former suit.

It is only where the *subject matter* of a suit is the same—where it is inseverable—that the former judgment operates as an estoppel to prevent the defendant from bringing forward, in a second suit, the same cause of action, or a part of it. The principle has no application where the *subject matter* is *different*. A judgment may work an estoppel upon both parties where the *subject matter* is the same, or where the subject matter is different, but the *issues are the same*.

In Southern Pacific Railroad v. United States, 168 U. S. 1, at page 50, the court, commenting upon this principle, from Cromwell v. Sac county, said:

> "that a judgment upon the merits constitutes an absolute bar to a subsequent suit upon the *same cause of action* in respect to every matter offered

> and received in evidence, or which might have been offered to sustain or defeat the claim in controversy, while if the second action is upon a *different claim or demand,* the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered."

In the case just cited (168 U. S. 1) counsel for the railroad company contended that the cases decided in 146 U. S. 570, 615, were not a bar to the defense in that case, because the subject matter was different, that is, the suit involved separate and distinct tracts of land; but the court, while conceding that the subject matter was different, and conceding that the subject matter was severable, held that the *rights, questions and claims* of the respective parties in issue in the former suits and determined by the court, precluded the railroad company from urging the same rights, questions and claims in the latter case, and that such adjudication could be made a ground of recovery by the government in the latter case.

It is obvious that if the contention of counsel that the cause of action is inseverable were sound, that the case of United States v. Southern Pacific Railroad, decided in 146 U. S. 570, would have operated as a bar *against the government* to maintain the two cases, or either of them, of United States v. Southern Pacific Railroad, decided in 146 U. S. 615, 619, but in each case as here, the subject matter was different, being distinct tracts of land.

It is equally apparent that the adjudication of either one of the cases of United States v. Southern Pacific

Railroad, 146 U. S. 570, 615, 619, would have operated as a bar and estoppel against maintaining an action for the lands involved in the case of United States v. Southern Pacific Railroad, 168 U. S. 1, 66.

The same principle would apply in the numerous cases cited by the court in 168 U. S. 49, 50 and 51, where the court allowed a recovery upon different coupons of bonds of the same issue, and of different bonds of the same issue and of different tracts of land, such as

> Last Chance Mining Company v. Tyler Mining Company, 157 U. S. 683, 691,

where the plaintiff in the latter case was permitted to recover a tract of land not the subject matter of a former suit, but which was embraced within the limits of a mining claim which it had been adjudged to be valid and legally located.

Counsel for defendant strangely loses sight of the position which the Southern Pacific Railroad Company occupies in these litigations. The former adjudication was against that company, and it is precluded from questioning the *claims, issues, rights* and *facts* determined in the former litigations. The estoppel is against that company from questioning the former adjudication, but does not estop the United States from recovering other tracts of land from that company, and from having the benefit of the former adjudication, as has already been decided.

In the present bill the United States has pleaded and claimed the benefit of the adjudications in the former suits, holding that the lands within the 30-mile limits

of the Atlantic and Pacific grant cannot be taken in any manner by the Southern Pacific, under its grant of March 3, 1871, and in support of these averments the government has introduced in evidence the records of the former adjudications [record 291, 363, 514], and it is stipulated that the reported opinions of the Supreme Court may be considered in evidence. [Record 279.]

That the government is entitled to the benefit of the adjudications in the former suits against the Southern Pacific Railroad Company as to any *right, question* or *fact,* distinctly put in issue and finally determined, there can be no doubt, even although the subject matter in such former suits was different from the present suit, involving, as such former suits did, other and distinct tracts of land.

Southern Pacific Railroad v. United States, 168 U. S. 1.

Conclusion.

We submit in conclusion that the decree of the Circuit Court, affirmed by the Circuit Court of Appeals, in favor of the United States, for the unsold lands erroneously patented, and for the minimum government price of lands erroneously patented and sold to *bona fide* purchasers, was right, and should be affirmed.

Submitted,

JOSEPH H. CALL,
Special Assistant to Attorney General.

APPENDIX.

ACTS OF CONGRESS.

ATLANTIC AND PACIFIC GRANT

July 27, 1866 (14 Stat., 292).

AN ACT Granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast.

Section 1 incorporated the Atlantic and Pacific Railroad Company and provided for the construction and location of a line of railroad, as follows:

"Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route, as shall be determined by said company, to a point on the Canadian river; thence to the town of Albuquerque, on the River Del Norte, and thence by way of Aqua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific."

Section 2 grants a right of way, etc.

'SEC. 3. *And be it further enacted,* That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and

telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State; and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided,* That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further,* That the railroad company receiving the previous grant

of land may assign their interest to said 'Atlantic and Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act; and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further,* That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: *And provided further,* That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.' "

"SEC. 4. *And be it further enacted,* That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company

the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

"SEC. 6. *And be it further enacted,* That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled, 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be, and the same are, hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

"SEC. 8. *And be it further enacted,* That each and every grant, right, and privilege herein, are so made and given to and accepted by said Atlantic and Pacific Railroad Company upon and subject to the following conditions, namely: That the said company shall commence

the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, Anno Domini eighteen hundred seventy-eight."

"SEC. 9. *And be it further enacted,* That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

"SEC. 11. *And be it further enacted,* That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

"SEC. 12. *And be it further enacted,* That the acceptance of the terms, conditions, and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed, pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall

be deposited in the office of the Secretary of the Interior."

"SEC. 18. *And be it further enacted,* That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco; and shall have a uniform gauge and rate of freight or fare with said road, and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided; and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

"SEC. 20. *And be it further enacted,* That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act."

JOINT RESOLUTION OF JUNE 28, 1870.

(16 Stat. L., 382).

"*Be it resolved by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven, and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

TEXAS PACIFIC AND SOUTHERN PACIFIC ACT.

March 3, 1871 (16 Stat. L., 573, 579).

"AN ACT To incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes."

Sections 1 to 22 of this act incorporated and made a grant of lands to the Texas Pacific Railroad Company.

Section 23 provided as follows:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however,* That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

ACT OF FORFEITURE.

Act of July 6, 1886 (24 Stat. L., 123).

AN ACT to forfeit the lands granted to the Atlantic and Pacific Railroad Company, etc.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That all the lands, excepting the right of way, and the right, power and authority given to said corporation to take from the public land adjacent to the line of

said road material of earth, stone, timber, and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations, heretofore granted to the Atlantic and Pacific Railroad Company by an act of Congress entitled 'An act granting lands to aid in the construction of railroad and telegraph lines from the States of Missouri and Arkansas to the Pacific Coast,' approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and the indemnity limits, as contemplated to be constructed under and by the provisions of said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph line be, and the same are hereby, declared forfeited and restored to the public domain."

ACT OF CONGRESS OF MARCH 3, 1887.

(24 Stats. 556.)

AN ACT to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That the Secretary of the Interior be, and is hereby, authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court,

each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

SEC. 2. That if it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States, to or for the use or benefit of any company claiming by, through or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or re-conveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so re-convey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

SEC. 3. That if, in the adjustment of said grants, it shall appear that the homestead of pre-emption entry of any *bone fide* settler has been erroneously cancelled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided*

also, That he did not voluntarily abandon said original entry. *And provided further,* That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

SEC. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants, respectively, shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification of patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the

said amount: *Provided,* That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: *And provided,* That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided,* That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupa-

tion have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further,* That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

SEC. 7. That no more lands shall be certified or conveyed to any State or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State, corporation, or individual would be rightfully entitled."

Approved, March 3, 1887. [24 Stat. 556.]

ACT OF CONGRESS, FEBRUARY 12, 1896.

(29 Stat. 6.)

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That section four of an act entitled 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes,' approved March third, eighteen hundred and eighty-seven, be, and the same is hereby, amended by adding thereto the following proviso: *Provided further,* That where

such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the Government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the Government a sum equal to the difference between the portion of the purchase price so paid and the Government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser.' "

ACT OF CONGRESS OF MARCH 2, 1896.

(29 Stat. 42.)

"*Be it enacted, &c.,* That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress, and amendments thereto, is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided,* That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

SEC. 2. That if any person claiming to be a *bona fide* purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons, for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons, for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option as prescribed in sections three and four of chapter three

hundred and seventy-six of the acts of the second session of the Forty-ninth Congress.

SEC. 3. That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are *bona fide* purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no suit shall be instituted, and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land, as hereinbefore specified.